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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

22 Cr. 6 (KPF)

PIERRE GIRGIS,

Defendant.

Motion

New York, N.Y.
November 15, 2023
10:00 a.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

DAMIAN WILLIAMS

United States Attorney for the
Southern District of New York

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-and-

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NBF3GIRM

1 (Case called)

2 MS. KUSHNER: Good morning, your Honor. Sarah
3 Kushner, Kyle Wirshba for the government, and also at counsel
4 it's table is Scott Claffee from the National Security
5 Division.

6 THE COURT: Mr. Dalack?

7 MR. DALACK: Good morning, Judge. Andrew Dalack,
8 Michael Arthus, and Hannah McCrea from the Federal Defenders.

9 With apologies, I flagged to the Court this morning
10 that we intend to waive Mr. Grgis's presence today, and I
11 apologize for not giving the Court more advance notice.

12 THE COURT: That's fine. He was welcome. He's also
13 welcome to waive, and we'll let him do that. But I think that
14 it is an interesting issue that raises for me and an
15 interesting logistical issue which is, in theory, there is a
16 component of this oral argument that is classified. And, in
17 theory, there is a component that is not classified. I'm not
18 going to move us to the classified portion preemptively because
19 there are courtroom access rights that have to be vindicated as
20 well.

21 What I'm -- I won't say struggling with, but what I've
22 been thinking about is exactly how much classified information
23 has to be disclosed in this proceeding as a whole? For
24 example, it seems to me that you've made arguments, and your
25 arguments are made in documents that are publicly documented

NBF3GIRM

1 and can be addressed in a public manner. And to the extent
2 that I'm talking about FISA or Circuit and District Court
3 decisions addressing FISA, I think I can talk about them here.
4 It seems to me that only if I were getting into the minutia of
5 the FISA applications at issue here would I be heading off into
6 classified territory.

7 That's a very long way of saying where, if at all, do
8 you think we need to stop speaking in this courtroom and move
9 to the classified courtroom?

10 MR. DALACK: I'm certainly happy to let the government
11 take that up. From our perspective, we're not in possession of
12 any classified material in connection with this case. So, I
13 suspect to the extent we get into any of the minutia or details
14 with respect to the FISA applications themselves and their
15 content, that might be an appropriate time to relocate.
16 Obviously we would want to be able to participate in that. I
17 think the government might have a contrary position to our
18 participation in that setting. But it certainly would go to
19 the spirit of our motion to compel.

20 THE COURT: May I ask the question a different way,
21 please. Which is do you believe that I can address the issues
22 raised by your motion without adjourning to the classified
23 courtroom?

24 MR. DALACK: I think you can, your Honor, yes. I
25 think though, because we're not privy to any of the substance

NBF3GIRM

1 of the applications, we've asked the Court to, in its sort of
2 supervisory powers and pursuant to the Fifth and Sixth
3 Amendments, allow us an opportunity to potentially receive
4 summaries or substitutions concerning some of the content of
5 the FISA applications.

6 The reasons why we think we are entitled to those
7 certainly doesn't affect any classified information. It might
8 implicate some information that was disclosed to us pursuant to
9 the protective order in this case, but doesn't concern any
10 classified information.

11 So, yes, I think we can have a full argument on the
12 merits of our motion to compel without having to relocate.

13 THE COURT: Thank you, sir.

14 Ms. Kushner, am I addressing questions to you or to
15 Mr. Wirshba or to Mr. Claffee this morning?

16 MS. KUSHNER: To me, your Honor.

17 THE COURT: Thank you so much. What is your position,
18 please?

19 MS. KUSHNER: Your Honor, the government's position is
20 that anything that is in the publicly filed briefs would be
21 completely appropriate for the parties and the Court to discuss
22 that in open court. And anything that was redacted and only
23 contained in the classified brief would have to be addressed in
24 an ex parte Section 2 setting.

25 THE COURT: To that end, if we get to that point, and

NBF3GIRM

1 I might need signals from folks at the front table to tell me
2 we're getting near that point, are you contemplating that's a
3 proceeding I'm having with just the folks at the front table?

4 MS. KUSHNER: That's correct, your Honor.

5 THE COURT: Okay. I understand what you are saying.
6 Do you believe, same question I asked Mr. Dalack, that I need
7 to -- well, I'll ask the question from the opposite
8 perspective.

9 Do you believe I can address fully the defense's
10 arguments for disclosure of additional information without
11 getting into classified materials?

12 MS. KUSHNER: Yes, your Honor, to the extent that the
13 Court feels comfortable that it could determine or that it
14 could relay in this courtroom that it would be able to review
15 the legality of any FISA materials in an ex parte proceeding.

16 THE COURT: Okay. Let me do this. Let me --
17 Mr. Wirshba, what is she missing?

18 MR. WIRSHBA: Your Honor, I was just conveying with my
19 colleague that the Court of course has the benefit of the
20 government's written motions and a substantial amount of
21 classified discovery that's been submitted to the Court. So
22 unless the Court has any questions about that specifically, I
23 think the Court would be able to address any questions that do
24 not relate to those materials in an open setting, and then make
25 a decision based on the written materials it has that are

NBF3GIRM

1 classified and any discussion it requires with respect to the
2 unclassified materials which have been submitted to it.

3 THE COURT: Thank you. And to that end, let me note
4 that I have reviewed all of the materials that are on the
5 public docket. I have also been given a rather lengthy
6 submission, classified submission from the government. I have
7 reviewed it in its entirety. I've reviewed the brief and I've
8 reviewed all of the exhibits that go along with it. There is a
9 lot. And so, I do think, I will do my best, and I believe I
10 can separate what I know from the publicly filed information
11 from what I learned from that. But, I will proceed.

12 Mr. Dalack, this is your motion, so am I directing
13 questions to you or to someone else at your table?

14 MR. DALACK: With the Court's permission, I think
15 Mr. Arthus will handle the laboring oar on that.

16 THE COURT: Welcome and thank you.

17 MR. ARTHUS: So I won't belabor everything in the
18 motions because obviously it was pretty heavily briefed.

19 With regard to the FISA materials, though, there is
20 one thing I really want to emphasize and stress in terms of the
21 necessity of us participating in that litigation and our input.

22 This is a unique FISA-related case. This isn't a
23 situation where we're hypothesizing about a *Franks* issue or
24 making some sort of supposition. There is a clear-cut *Franks*
25 issue from the discovery that we have received that exists,

NBF3GIRM

1 that is going to be subject to litigation, and that is likely
2 going to be successful. The Court is I'm sure aware of what
3 the *Franks* issue is.

4 THE COURT: I am aware. I'm not joining you with the
5 likely to be successful point yet. I've read several thousand
6 pages more material than you have. I'm not sure you are going
7 to make the materiality or the absence of probable cause. But
8 that's for another proceeding.

9 MR. ARTHUS: That's the subject we really want the
10 opportunity to litigate, and it is really necessary for us to
11 litigate, and we are not capable of litigating without the
12 actual underlying FISA materials. It is practically impossible
13 for us to challenge and make out the materiality standard
14 without actually seeing the warrant and affidavits that we're
15 trying to challenge. We know there are material
16 misrepresentations and omissions, or at least there are
17 misrepresentations and omissions, namely --

18 THE COURT: There are two. May I call them for short
19 Flanagan and McGonigal?

20 MR. ARTHUS: Sure, yes, yes.

21 THE COURT: I appreciate that there are more words
22 than that, but I believe I understand those to be the
23 categories of misrepresentations you've identified.

24 MR. ARTHUS: There are at least two. The government
25 seems to be contesting our position that there was an e-mail

NBF3GIRM

1 that was sent between the government.

2 THE COURT: The Connors e-mail, sir. That, suffice it
3 to say, that's not an additional category of misrepresentation.

4 MR. ARTHUS: I'll take that.

5 So those are the two categories of misrepresentations
6 and omissions. We would point to Flanagan's background and the
7 McGonigal situation, and we need the chance to be able to
8 litigate those. In order to do that, we have to be able to see
9 the entire warrant materials to explain why this
10 misrepresentation and omission was material. And it involves
11 placing what is in the FISA materials in the context of
12 everything that's been going on in this case, which is over
13 200,000 pages of discovery that we've seen, electronic
14 communications, hundreds of hours of recorded calls in Egyptian
15 Arabic. This is precisely the type of situation where
16 adversary litigation will be necessary here to place all that
17 in context.

18 THE COURT: Sir, actually, I have broader questions,
19 but I am going to meet you in these granular questions with the
20 arguments you are raising. And please understand -- your
21 colleagues will tell you -- sometimes I ask questions to kick
22 the tires, and I wouldn't be doing my job if I weren't being
23 probative or really challenging all of your arguments. So
24 don't read too much into this.

25 But, given the materials that you have seen, and some

NBF3GIRM

1 of which are actually summarized in, for example, the
2 indictment in this case or summarized in the government's press
3 release about the indictment or in publicly filed information,
4 why does -- Mr. Flanagan seems to be a hair on the tail of the
5 dog. I'm not sure you're suggesting, or maybe you are, that if
6 you were to look at the totality of the materials, you'd
7 realize his criticality to the whole case. But there is a
8 whole lot of stuff that would seem to me that doesn't any in
9 way he implicate Mr. Flanagan.

10 So why do I care?

11 MR. ARTHUS: What we've seen in the Rule 41 warrant is
12 that Flanagan is the central figure in that Rule 41 warrant. I
13 was reviewing it again last night, and there seems to be only
14 one aspect of that warrant that doesn't at least cite to him or
15 reference him or is based on information that was provided, and
16 that was the FBI interview. Other than that, 95 percent of the
17 factual allegations in that warrant relate to what they call
18 Retired Captain-1. He's cited in all those paragraphs. He's
19 the source of all of the information.

20 So, if he is likewise the critical source of
21 information in the FISA warrant, then he is the critical source
22 of probable cause, and that's what we would need to challenge,
23 but we haven't seen it, is the issue.

24 THE COURT: Of course. Now let's go into the broader
25 point. You've just hit the nail on the head. Is he the

NBF3GIRM

1 critical source for all of the other information? I know, you
2 don't; government knows, and you don't, and I get it. I
3 appreciate why you want to know this information.

4 The issue for me is that there seem to be a whole lot
5 of Circuit Court decisions across the country that allow, that
6 permit the *ex parte* review process that is contained in FISA.
7 And indeed, I know the Seventh Circuit in the *Daoud* case, in
8 particular, Judge Rovner's concurrence makes a point of saying,
9 a recognition that FISA makes *Franks* applications difficult, or
10 *Franks* challenges difficult. Because it is hard to know what
11 was in the underlying FISA warrant, and I get that and I
12 appreciate what you are saying to me, which is this is the
13 unicorn case where you actually know that there is a mistake.

14 But, stepping back a moment, I understood the point of
15 FISA, the procedures of FISA to be that I got to do the review.
16 I'm given everything. I'm also given your arguments, both your
17 public arguments and then any Section 2 arguments you want to
18 make. And I'm allowed to look and see whether in fact
19 Mr. Flanagan was critical or not. Whether he even shows up at
20 all.

21 And so I'm not sure why, given that the courts
22 recognize and have allowed and recognized the constitutionality
23 of this *ex parte* proceeding, I'm not sure why this case is so
24 different that I can't do what I do in any other FISA case.

25 MR. ARTHUS: So I think the answer to that would be

NBF3GIRM

1 two-fold. FISA certainly contemplates *ex parte* review of the
2 materials, but it does contain, both through the case law,
3 through the constitutionality of it, exceptions for where our
4 input is necessary to accurately determine the legality.

5 We don't have any question about the Court's ability
6 to read a warrant application and read that *ex parte*. That is
7 certainly legal. Our position is based on the scope of the
8 discovery that we've seen, the truly complicated, complex stuff
9 that we've received, thousands and thousands and thousands of
10 pages of electronic disclosure, hundreds of calls in Egyptian
11 Arabic, we don't expect the Court to have the time to actually
12 be able to sit down and review those in conjunction with
13 reviewing the search warrants. It's taken us months and months
14 and months and months to even start to be able to work through
15 this. And we believe that the entire scope of the case would
16 necessitate that. Not to mention the case law has also been
17 pretty explicit in saying that *Franks* situations are precisely
18 the types of situations where disclosure would be appropriate
19 under FISA.

20 THE COURT: Okay. So let's back up, please.

21 To the extent you are relying on Section 1806(f) or
22 Section 1825(g), I'm understanding that I am permitted to
23 disclose those materials to you only where it's necessary to
24 make an accurate determination of the legality of the
25 electronic surveillance or the physical search.

NBF3GIRM

1 So to the extent that I myself have thousands of pages
2 of materials to review, and I can do that and I don't need your
3 help, why do I nonetheless have to disclose this to you? I
4 appreciate if I can't understand it, then yes, of course. But
5 what if I can?

6 MR. ARTHUS: There is also a due process aspect of it
7 too that is implicated here.

8 THE COURT: Courts have allowed the ex parte review in
9 the face of due process concerns, including the Second Circuit.

10 MR. ARTHUS: Yes, they've certainly permitted it in
11 circumstances, but there is a built-in mechanism within FISA
12 that says that disclosure is required if necessary to comport
13 with due process.

14 THE COURT: Sure. That's 1825(h).

15 MR. ARTHUS: Yes. And here I think this is a
16 situation where disclosure is necessary for due process. We
17 have Brian Connors who is the affiant, or at least likely the
18 affiant for these warrants. When you look at the Rule 41
19 warrant, it's very troubling with what he included, with what
20 he left out. And if there is a similar circumstance where --

21 THE COURT: What's so troubling about the Rule 41
22 warrant?

23 MR. ARTHUS: The fact that when he is citing to his
24 primary source in that Rule 41 warrant is Flanagan. And he,
25 through the discovery materials that the government has

NBF3GIRM

1 provided us, Connors at least had a supposition, an inkling,
2 and likely knew that Flanagan had a criminal record at the time
3 he was tasking him as a source.

4 THE COURT: First of all, not convinced he is a
5 source, at least not in the formal sense. Two, what makes you
6 believe that Connors either knowingly, intentionally omitted
7 this information or did so with reckless disregard?

8 MR. ARTHUS: I think that's what he said to the
9 government when the government subsequently interviewed him, is
10 he had been alerted by the NYPD authorities that Flanagan was
11 someone who would likely not talk to law enforcement, which he
12 interpreted as having something to do with a criminal record or
13 prior criminal contacts. Yet he conducted no background check
14 whatsoever. Something as simple as the government was very
15 easily able to figure out, just by running a rap sheet,
16 conducted no background check of this man whatsoever. There
17 were red flags early on that he had a criminal record, and
18 Connors did nothing to look into that, let alone include it in
19 his warrant application. And then I think actually told the
20 government later on that he didn't know that inclusion of
21 someone's criminal record was really even a necessary part of a
22 warrant application, which seems --

23 THE COURT: I'm not sure I understood that. I thought
24 there was something about running criminal records for folks
25 who were sources, as distinguished from anyone who comes in and

NBF3GIRM

1 speaks to the FBI.

2 MR. ARTHUS: Yes.

3 THE COURT: But yet again, I also don't quite
4 understand the materiality of this. And we're wandering a
5 little far afield from the overarching issues you want to
6 raise. You are here with the 41 warrant, so we'll talk about
7 it.

8 It's not at all clear to me that Flanagan is the
9 principal source, but fine, that's your argument. Even if he
10 is, there is an awful lot of stuff that's been produced to you
11 that does not have Flanagan's fingerprints anywhere on it.

12 MR. ARTHUS: Yes, in the discovery, yes.

13 THE COURT: In the discovery, yes.

14 MR. ARTHUS: Yes, I'm focusing on -- that would be the
15 focus in the *Franks* context, would be on the actual face of the
16 warrant application itself, and that is heavily reliant on
17 Flanagan. It is almost every single paragraph references him
18 short of the FBI interview.

19 So, in terms of the actual trial itself, the trial
20 that would happen, there may be a discussion about how
21 important of a witness Flanagan is. But in terms of the
22 warrant applications, he was all over at least the Rule 41
23 warrant, in every single paragraph is referencing him, short of
24 the one FBI interview that took place, which our position is --
25 and not having fully briefed it -- but our position is that

NBF3GIRM

1 that one FBI interview wouldn't be sufficient to establish
2 probable cause. They need Flanagan to get probable cause, and
3 that's talking about the Rule 41 warrant in the FISA context.
4 Not to mention Connors' involvement, because Connors is the --
5 Connors is what this *Franks* hearing is about. The *Franks*
6 hearing is not about Flanagan's credibility as much as
7 Connors', not including issues in the warrant applications
8 themselves.

9 THE COURT: "Issues"? One issue. What's the issues
10 that he didn't include?

11 MR. ARTHUS: A critical issue --

12 THE COURT: It's a stupid thing that ends up being a
13 criminal act, a misdemeanor in Long Island. It is profoundly
14 stupid. I'll agree with you on that part. But I'm not sure it
15 undoes probable cause, given everything else that you've seen
16 and that you've received. Maybe in that Rule 41 warrant, okay.

17 Let me pivot though. Imagine hypothetically that
18 Connors isn't the affiant on any of the FISA materials.
19 Imagine. Imagine there's a whole lot of stuff that doesn't
20 involve him at all. Why does your potentially successful
21 *Franks* application on the Rule 41 warrant have anything to do
22 with anything on the FISA warrants, particularly if I can
23 figure out and isolate there is no Connors' involvement and no
24 Flanagan involvement in certain aspects?

25 MR. ARTHUS: Sure. I know that the Court appreciates

NBF3GIRM

1 that we're kind of shadowboxing here because we don't know, we
2 are just guessing here.

3 THE COURT: I am hypothesizing, so I'm not helping you
4 any.

5 MR. ARTHUS: What we see in that e-mail exchange with
6 the government is there was some sort of misrepresentation and
7 omission. If it wasn't Connors or Flanagan or anything related
8 to the Rule 41 warrant, then there is some other material
9 misrepresentation or omission out there that we need to
10 investigate and litigate about. But we don't know what's in
11 there.

12 All we know is there was a misrepresentation and
13 omission, the government investigated it, the government made
14 this determination they didn't consider it to be material, and
15 in that situation, that's the precise thing that we're seeking
16 to litigate, is whether it was material or not.

17 THE COURT: Let's go back to due process and the ex
18 parte proceedings. In your research, have you found a
19 situation where a federal court has found that FISA's ex parte
20 procedures are violative of someone's constitutional rights?

21 MR. ARTHUS: No.

22 THE COURT: The one District Court case that did then
23 got overturned by the Seventh Circuit.

24 MR. ARTHUS: Yes. There is nothing we can point to as
25 this is a case that has said this is unconstitutional or that

NBF3GIRM

1 it violates due process.

2 THE COURT: Have you seen a case in which a disclosure
3 has been made pursuant to 1825(h), and in particular the due
4 process portion of it, have you actually seen a court rely on
5 that as a basis for disclosure?

6 MR. ARTHUS: No, I don't believe so. I also don't
7 believe we've seen a case that closely mirrors what's actually
8 happening here, which is that we have a clear-cut *Franks* issue
9 that exists in a case. Much of the decisions that we've seen
10 are opinions where the Court is saying that the defense is
11 hypothesizing about a potential *Franks* issue. Just kind of
12 citing *Franks* as a backdoor to get into the FISA materials. I
13 don't think we've seen a case so far that points to the
14 existence of a *Franks* issue, and yet disclosure was not
15 ordered.

16 I think it's rare to actually see a case in this
17 context where there is a clear *Franks* issue that we are
18 absolutely entitled to litigate, and that we simply can't
19 because we don't have the materials, and so we can't
20 meaningfully do anything but submit a boilerplate motion at
21 this point saying there is a *Franks* issue in the FISA context.

22 THE COURT: Fair.

23 One of the things that doesn't help your argument is
24 the fact -- if you just focused on *Franks* and if you just said
25 we have a clear *Franks* issue in the Rule 41 warrant and we

NBF3GIRM

1 imagine, we just imagine -- in an educated way, you are not
2 guessing, but you are thinking, knowing how investigations
3 work, it would not shock us to learn that the affiant on the
4 Rule 41 warrant also had a significant involvement in the FISA
5 applications, and for this reason we believe we are entitled to
6 it. I understand that argument. That's fine. That's a nicely
7 cabined in argument.

8 But then, where you lose me is where you start to say
9 now we need to consider whether the certifications were
10 properly made. Now we need to consider whether there was
11 proper minimization. You have no basis for contesting the
12 certifications that were made. Do you?

13 MR. ARTHUS: I think it is certainly in the
14 minimization context, we certainly do have a basis, which is
15 certainly we've seen a lot of discovery in this case. And what
16 we've seen is that this was surveillance that was going on for
17 years encapsulating, as we said, hundreds of thousands of
18 electronic communications, and hundreds of hours of these
19 recorded calls. That in itself gives rise to the likelihood
20 that there wasn't sufficient minimization, because this dragnet
21 is capturing basically every conversation that Mr. Grgis had
22 with other individuals.

23 It doesn't seem, based on what we've seen in the
24 discovery, that this was cabined or targeted in any way to
25 limit the acquisition of non-national security related

NBF3GIRM

1 information. We can't say more than that, because we don't
2 have access to any of the certifications underlying, but what
3 we've seen in the discovery gives rise to, at the very least,
4 serious minimization concerns.

5 THE COURT: Simply by dint number of materials you've
6 received.

7 MR. ARTHUS: And the content. The fact it sweeps so
8 broadly. It seems to be capturing a lot of stuff that, when
9 we're reading it, we're scrolling through it because it has
10 nothing to do with anything related to foreign agents or
11 foreign registration or anything in that context. We're
12 reading a bunch of personal communications he's having with
13 individuals that would seem to sweep well beyond any kind of
14 reasonable minimization procedure.

15 THE COURT: Answer the first part of my question
16 though. What challenges do you have to certification? It is
17 not for me to second guess the certifications. I've seen the
18 certifications, they exist. I understood that I am to presume
19 them to be valid.

20 What's the basis for me to do away with that
21 presumption? And more importantly, what is the basis for me to
22 let you see these materials on a certification challenge?

23 MR. ARTHUS: I think it would be because what we've
24 seen with the way that this was handled, with the way that this
25 investigation was handled, with the way that the search

NBF3GIRM

warrants are troublingly leaving out important information with the way that they seem to sweep well beyond normal minimization, there is serious concerns about the way that the FISA process was utilized in this case. And this isn't a case where it seems like they checked off all the appropriate boxes in every other context and we are saying just give us access to the certifications. It seems like there were a lot of problems with the FISA process here. So we would point to certification.

THE COURT: What are the problems? I want to make sure I understand the problems, because obviously you're understanding the skepticism with which I'm viewing that answer you've just given me.

MR. ARTHUS: Yes.

THE COURT: Because once again, are you disagreeing with the law -- am I misstating the law?

MR. ARTHUS: No.

THE COURT: Which they're presumed valid, and it is not my job to second guess them. And you are asking me to second guess them. And what's your basis for thinking -- and wait, you are going to say it is the errors, the McGonigal and Flanagan errors, and in part because the government gave you a lot of materials it had obtained through this process.

MR. ARTHUS: Yes.

THE COURT: Okay. And what else?

NBF3GIRM

1 MR. ARTHUS: That's what we have. This is the issue
2 is we don't have the rest of it to challenge it.

3 THE COURT: I understand and I appreciate your
4 backdoor efforts to get them that way.

5 My point is you might have a minimization argument.
6 Perhaps you have a probable cause argument. But I don't see
7 how you have a certification argument, and that's why I'm
8 pushing you so hard on it. I want to understand with clarity
9 what it is you are really fighting about here.

10 MR. ARTHUS: Yes. In terms of certification, and I'll
11 briefly touch on certification. I think the Court can
12 understand the frustration that we have in terms of we are
13 being asked what are the issues with the certification, but we
14 haven't seen the certifications. You're certainly correct that
15 it is the Court's authority to be able to review these
16 certifications in camera. That's contemplated by FISA. But
17 given the universe of problems that's happening here, we would
18 say that points to potential certification problems as well.

19 THE COURT: Let me just say over and over again that's
20 the weakest argument you've made to me this morning, and
21 perhaps you don't want to focus on it.

22 MR. ARTHUS: Sure.

23 THE COURT: I'll leave it at that. Thank you.

24 Was there something you wanted to add to your answer?

25 MR. ARTHUS: No.

NBF3GIRM

1 THE COURT: Good move.

2 Let me then understand, to the extent you haven't
3 already articulated it, the specifics of your constitutional
4 challenges. It seems to me that what you are saying something
5 that in the face of all of these court decisions finding FISA
6 to be constitutional, both in the main and as applied, this
7 case is different because of the errors and because of the
8 productions that you've received.

9 MR. ARTHUS: That's correct, yes.

10 THE COURT: Now from there, tell me why there are
11 actual constitutional violations here.

12 MR. ARTHUS: Yes. So *Alderman* stresses the importance
13 of adversary litigation, particularly in circumstances
14 involving electronic surveillance, voluminous discovery,
15 potential *Franks* issues, *Alderman* points in those cases to the
16 importance of adversarial litigation as a component of due
17 process.

18 What we're simply trying to do here is put on a
19 defense for this man and litigate the suppression issues that
20 seem to us apparent, to at least be able to litigate them.

21 THE COURT: You can litigate the Rule 41 one. I'm
22 just not sure that whatever Rule 41 problems you have give you
23 entree to the FISA materials. That's what I keep saying, and I
24 know you don't believe me. That's where our problem is right
25 now.

NBF3GIRM

1 MR. ARTHUS: We have no choice but to assume, from our
2 perspective, that the Rule 41 warrant and the FISA warrant are
3 similar. That's the only choice we have, because we haven't
4 seen the FISA warrant, and the FISA application. If the Rule
5 41 warrant and the FISA warrants are even closely related to
6 each other, if there is reference to Flanagan, the fact that
7 they're both apparently sworn out by Connors who was leaving
8 out critical information from the Rule 41 warrant, we have no
9 choice but to assume that there are problems with the FISA
10 application. That means that we need to have an opportunity to
11 litigate that, to comport with the due process.

12 I think what's missing from the other cases
13 challenging the constitutionality of FISA, as the Court noted,
14 is the unique circumstances here, which are the problems that
15 are clearly apparent on the face of the record here from the
16 discovery we received. And that's the main thing. It is the
17 reliability of Connors that is the issue here. And we know
18 that Connors is the affiant on the Rule 41 warrant, and
19 everything we've seen indicates that Connors is also the
20 affiant on the FISA applications, and therefore, with his
21 reliability in question, that is something we need to be able
22 to litigate, and *Alderman* points to us being able to litigate
23 that.

24 THE COURT: Connors' reliability seems to me entirely
25 derivative of his invocation of Flanagan. Is there some other

NBF3GIRM

1 area in which Connors has done something in your estimation
2 incorrect in the Rule 41 warrant or others?

3 MR. ARTHUS: I think what we see from the discovery is
4 that Connors is someone who is -- I'm trying to think of the
5 nicest way to put this. Someone who overlooks very important
6 information. And when you look at just Flanagan --

7 THE COURT: If you are going to malign him, tell me
8 how. What is he overlooking?

9 MR. ARTHUS: In the context of -- let's stick with
10 Flanagan for a second. In the context of his relationship with
11 Flanagan, he is alerted very early on that there are problems
12 with Flanagan. That Flanagan is someone who is not going to
13 speak to law enforcement, he interprets that as potentially a
14 problem with Flanagan's background. Doesn't conduct any
15 background check. Doesn't actually formally sign him up as a
16 source at any point. Doesn't look --

17 THE COURT: I'm not sure what's wrong about not
18 signing him up as a source. You can fault him for not doing a
19 background check.

20 MR. ARTHUS: These are things he discussed with the
21 government, so the government was asking questions about this,
22 so obviously the government was troubled by Connors not signing
23 him up.

24 THE COURT: I don't understand that at all. I need to
25 you connect those dots for me. What did he do wrong in not

NBF3GIRM

1 signing up Flanagan as a source? I would have thought it was
2 fine that he didn't sign him up, and his error -- if there is
3 an error -- is not running the criminal check on him,
4 concurrent with his discussions with him.

5 MR. ARTHUS: It is the universe of what's going on
6 with Flanagan. So not running a background check.

7 THE COURT: That's not acceptable. Thank you. Let's
8 try that again. You are telling me, you came out here and said
9 Connors overlooks important information.

10 MR. ARTHUS: Yes.

11 THE COURT: So fine. I want to understand the
12 important information he's overlooked. Then you say he was
13 aware of the Flanagan problems and didn't pursue them. That
14 may be a problem, and I have that down, but now you are saying
15 and he didn't sign him up as a source.

16 What is problematic? What is the important
17 information that he overlooked in not signing the man up as a
18 source?

19 MR. ARTHUS: That wouldn't be overlooking information.
20 That would be sloppiness in his actually conducting this
21 investigation.

22 THE COURT: Why? He didn't have to sign him up as a
23 source. Do you believe he had to?

24 MR. ARTHUS: No. Whether he formally had to is
25 different than whether or not he went out of his way not to,

NBF3GIRM

1 which would be our interpretation.

2 THE COURT: Your argument is he avoided signing him up
3 as a source so it would allow him to live in this gray area
4 where he didn't check his criminal background?

5 MR. ARTHUS: The not signing him up as a source is not
6 related to why he did or did not look into his criminal
7 background.

8 THE COURT: No, but what is the overlooked important
9 information? I am going to keep asking until you give me an
10 answer or leave this one as a basis. But you are saying he
11 overlooked important information.

12 MR. ARTHUS: Yes.

13 THE COURT: What is the important information he
14 overlooked in not signing him up as a source?

15 MR. ARTHUS: That's unrelated. I'll move that off.

16 THE COURT: Tell me --

17 MR. ARTHUS: Stick with the criminal background.

18 THE COURT: No, it was more than that. You said he
19 overlooked important information. What else, other than the
20 criminal history?

21 MR. ARTHUS: That is the important information. So
22 that's what we are relying on, is that the critically important
23 information that was not looked into.

24 THE COURT: You have made Connors a much badder actor
25 by saying this is someone -- you were trying to be pretending

NBF3GIRM

1 to be nice about it saying I don't know how to say this, and
2 then you came to say he overlooked important information. If
3 all you've got is the criminal history situation with Flanagan,
4 say that. The way you built this up suggested to me there was
5 more out there that Connors did wrong than that.

6 MR. ARTHUS: That's what we have, and that's he then
7 used that individual as the main source, in at the very least
8 the Rule 41 warrant, and made no effort to find out whether or
9 not this person was actually credible.

10 THE COURT: Let's changed topics, please.

11 MR. ARTHUS: Sure.

12 THE COURT: I think the McGonigal indictment is an
13 indictment in both the technical and the colloquial sense of
14 this individual. But, what's not helpful to me is when you say
15 things like "the government's response raises more questions
16 than answers." That's interesting rhetoric that is completely
17 lost on me.

18 If indeed McGonigal had barely touched this file, what
19 more information do you need? If the government has suggested
20 to you that he's only done certain things, and if they've
21 suggested to me, and I might ask them for greater granularity,
22 he's only done certain things, I don't know what other
23 information they have to give to you.

24 MR. ARTHUS: It seems to me a damage assessment was
25 done within the FBI to determine the extent to which

NBF3GIRM

1 McGonigal's investigations were tainted. So to the extent such
2 an assessment was done in this case, we certainly feel we would
3 be entitled to that under *Brady* and *Giglio*. That would be a
4 starting point. We understand that McGonigal, based on the
5 government's representations, led a briefing to the NYPD
6 leadership.

7 THE COURT: I missed the word.

8 MR. ARTHUS: Led a briefing to the NYPD leadership.

9 We would be entitled to any written records of that briefing as
10 well. Government said he facilitated I believe the
11 communication of information between the FBI and the NYPD.

12 It may be they've given everything they have on that
13 to us. If they have, then they've met their obligations. But
14 if there is more out there detailing McGonigal's involvement,
15 then we would certainly be entitled to that. But certainly a
16 damage assessment that was conducted within the FBI related to
17 this investigation we would be entitled to under *Brady*, and a
18 lot of the information that we have received about McGonigal is
19 heavily redacted. To the extent that the government -- that
20 the Court can review that in camera, we're fine with that.

21 THE COURT: Without getting into classified
22 information, I think it's safe -- Mr. McGonigal -- I didn't see
23 a lot of stuff with his name on it. I'll just leave it at
24 that. But okay. Perhaps the in camera review is the best way
25 to do it, so I can see what else would need to be disclosed.

NBF3GIRM

1 You then pivot to other surveillance methods and other
2 bases on which you believe you are entitled to information.
3 I'm not sure about -- and I don't mean this -- I am not saying
4 I disagree with it. I don't understand it. FISA seems to give
5 the government a lot of leeway to do electronic surveillance,
6 to do physical searches, to do things of that nature. And you
7 are even saying to me that you've received an awful lot of
8 materials.

9 Is your argument to me that you've got so much
10 information that this couldn't all have come from FISA and it
11 might have come from something else?

12 MR. ARTHUS: Yes. So not that it must have. It
13 certainly tracks with the type of information that we would
14 expect to be generated from Executive Order 12333. Certainly
15 from FISA 702 as well.

16 THE COURT: I thought I understood -- am I making this
17 up? I thought I understood that 12333 can't be used against
18 U.S. citizens after 2008. Is that not correct?

19 MR. ARTHUS: This would involve, this involves --
20 correct. Yes. This involves, though, individuals that -- and
21 this points also to the other two that we cited as well. It
22 seems that at least some of the surveillance was conducted
23 either when Mr. Gergis was overseas or with individuals who
24 were overseas.

25 So, to the extent that those three surveillance

NBF3GIRM

1 methods capture individuals who are overseas or surveillance
2 that happens overseas, it would be implicated in this case.

3 And incidental as well, incidental collection of those sorts of
4 surveillance.

5 THE COURT: You're making your challenges under Rule
6 41; you're making your challenges under FISA. I don't know
7 whether the government would represent that information came
8 from other sources. But I guess I appreciate that's the
9 argument, you need to know if there is another place for you to
10 make a challenge. It would seem odd to me, though, if the
11 government says here's materials that we got and we got them
12 through FISA, for you to then say, well, maybe you got them
13 from other places as well. So okay. I guess I understand the
14 argument, and the government will tell me what it thinks it can
15 tell me about this.

16 I'd like you please to engage with the government's
17 argument that Section 3504 of Title 18 of the United States
18 Code is a catchall, but it's really for stuff that isn't
19 covered by other statutes. It seems to me you are making the
20 arguments you're now making through FISA. There are provisions
21 of the statute that permit you to do that. You are making the
22 arguments under Rule 41. There are federal rules that permit
23 you to do that.

24 I'm not sure what the purpose or utility of 3504 is.
25 Except to the extent you're concerned that the government may

NBF3GIRM

1 come back and say gotcha because there's some bucket of
2 materials that isn't subsumed by these other statutes.

3 MR. ARTHUS: That is the concern, is that there may be
4 material in there that we don't know is suppressible because we
5 don't know the techniques that were used to obtain it. It is
6 possible that a suppression motion could be granted to all the
7 FISA material, all the Rule 41 material, and there would still
8 be evidence that was admissible at trial that was obtained
9 through other means that we had no idea we had a mechanism to
10 suppress, because we didn't know that the actual surveillance
11 techniques listed were used at all.

12 THE COURT: I understand that better. Thank you.

13 This may be the last topic and then I'll perhaps let
14 you sit for a little while and be equally as questioning of the
15 government.

16 I understand but I'm not sure I accept the recruiting,
17 cultivating, grooming argument. The tension for me in that is
18 that you seem to be -- and this is perhaps a broader point.
19 You seem to be acknowledging that the conduct that happened
20 that is discussed or that is evidenced in the materials or that
21 is discussed in the government's charging instruments or their
22 public statements, that that conduct happened. There was a
23 meeting in Egypt, was there not, with law enforcement officers?
24 There was, yes?

25 MR. ARTHUS: That is what the discovery materials

NBF3GIRM

1 would point to, yes.

2 THE COURT: I appreciate the precision of your
3 response.

4 MR. ARTHUS: Thank you.

5 THE COURT: The discovery materials would appear to
6 reflect that certain communications took place.

7 MR. ARTHUS: Yes.

8 THE COURT: And that certain communications or certain
9 meetings took place.

10 MR. ARTHUS: Yes.

11 THE COURT: And so I understood your argument, your
12 defense to be, not that these things didn't happen, but that
13 they happened without the requisite intent. That your client
14 was duped in some way. Am I correct?

15 MR. ARTHUS: Yes.

16 THE COURT: Okay. I almost feel you're grasping at
17 straws because there are people whose names appear repeatedly
18 in the government's discovery, there might have been some
19 concerted effort to cultivate expatriates and to get them to
20 become unregistered agents of the Egyptian government.

21 What is your evidence -- I feel as though, before I am
22 going to turn over that information, which I'm not even sure
23 exists, I feel there needs to be some threshold showing.

24 MR. ARTHUS: I'll make two points. First, there is a
25 reference in the discovery, I believe it comes from Flanagan,

NBF3GIRM

1 it is in the FBI reports, that individuals were concerned that
2 Mr. -- not concerned, but thought it was possible that
3 Mr. Gergis was acting as an unwitting agent. That seems to be
4 pointed at. So that's number one.

5 THE COURT: On the one hand, you are telling me
6 Flanagan is not to be believed. On the other hand, where it
7 helps you out, you're like, let's believe Flanagan.

8 MR. ARTHUS: Yes.

9 THE COURT: That's the argument you are making?

10 MR. ARTHUS: That fact wasn't in the warrants either.

11 Aside even from that, though, this is another circumstance
12 where, because we want to make sure we are not trying to
13 capture sources and methods and, if the information is not
14 there, it's not there. if the Court wants to review that in
15 camera, and if there is nothing there, there is nothing to
16 disclose. But if that information is there and does exist,
17 then it certainly bolsters our defense and we would be entitled
18 to it.

19 THE COURT: Here's my one concern. I don't mind in
20 camera review and that's fine. Mr. Dalack will recall from
21 another case that we have that I have this curious situation
22 where sometimes I can review material, and I can't tell you
23 whether the thing exists or doesn't exist. I can simply tell
24 you that there is nothing for me to disclose to you. It is a
25 very unfulfilling or unhelpful response. But it is by law the

NBF3GIRM

1 only response I can give.

2 So, I appreciate what you are saying, and I would like
3 to engage the government on the issue. But I am just wondering
4 what actually I can say. So I appreciate that.

5 Sir, those were the questions I had for you, and I
6 really, however mean I may have sounded, I really do appreciate
7 your preparedness and your attention to detail, because it's
8 obvious you have reviewed with great care all of the materials
9 that have been produced, and I'm grateful for that.

10 Is there anything that you wanted to make sure I
11 understood that I haven't questioned you about?

12 MR. ARTHUS: I think we covered it. Thank you.

13 THE COURT: All right. Ms. Kushner, you are up.
14 Where shall we begin.

15 Why don't we begin with the -- I don't think your
16 adversaries disagree that the law is what the law is. That it
17 is very rarely the case that FISA materials -- in fact, it's
18 never been the case that FISA materials have been disclosed to
19 a litigant. But that here, there are these two issues that we
20 don't have in another cases that I've reviewed.

21 I'd like you to engage on the Rule 41 issue versus the
22 FISA issue. But I'd also like you to engage on whether we've
23 now hit the matrix of facts that actually requires disclosure
24 as a matter of due process.

25 MS. KUSHNER: Sure, your Honor. I don't think we are

NBF3GIRM

1 anywhere even close to that world.

2 So, with respect to the *Franks* issue, either in the
3 Rule 41 or in the FISA context, the defendant would have to
4 make a substantial showing that the affiant in this case with
5 respect to the Rule 41 affidavit, Connors, deliberately or
6 recklessly made and included false statements in an
7 application, or failed to include material information.

8 And even if the defense could show one of those
9 things, which it has not, it would also have to show that the
10 resulting misrepresentation or omission was necessary to the
11 probable cause finding. So even if you had eliminated the
12 situation where a material misstatement made had eliminated
13 that from the affidavit but still could find probable cause.
14 Or in the case where information was omitted, had you included
15 that information in the affidavit, was that the reason that
16 probable cause was or was not found, and there is nothing here
17 that would rise to that standard.

18 The only alleged omission here is that Flanagan's
19 criminal history was not included in the Rule 41 affidavit.
20 But even that itself was not necessary, and would not have
21 undermined the probable cause finding.

22 The Rule 41 affidavit, to the extent it relies on
23 Flanagan, is based on recorded conversations, written
24 communications, all of which has been produced to the defense.
25 So this was not Agent Connors relying on the mere

NBF3GIRM

1 uncorroborated statements of Flanagan. And secondly, Flanagan
2 is not the primary or the chief source of the government's
3 information in the Rule 41 affidavit.

4 And I think we lay out all the instances, all the
5 facts that are not tied to Flanagan at all in our brief on
6 pages 13 to 15. So, probable cause is not dependent on the
7 fact that Flanagan had a criminal history.

8 THE COURT: Let me ask this. Let's imagine that I
9 defer on the FISA issue pending the resolution of the *Franks*
10 motion on the Rule 41 affidavit. If I were to find that *Franks*
11 has been violated, that this was in fact material and it was
12 necessary to a finding of probable cause, is that enough to
13 give them entree into the FISA serials?

14 MS. KUSHNER: Absolutely not, your Honor, but for
15 reasons that I would not talk about right now.

16 THE COURT: Okay. That I do understand. But, I guess
17 what I am saying is, is there a world in which I could defer a
18 question of disclosure until after the *Franks* hearing on the
19 Rule 41 application? You may tell me no. I am just asking
20 whether I need to see the *Franks* application on the Rule 41
21 warrant and make the determination there before I decide what
22 to do with the FISA materials.

23 MS. KUSHNER: No, your Honor. There won't be any
24 reason why the former would -- the latter would turn on the
25 former. Again, for reasons I'm happy to talk about in a

NBF3GIRM

1 Section 2.

2 THE COURT: It was not as clear to me before oral
3 argument why the defense is challenging the issue of
4 minimization. And it is interesting, because you would think
5 that the defense would want as much information as possible
6 about their client, and they would be happy with this surfeit
7 of information that's been produced. But in fact what they are
8 saying is there is so much that there must have been a problem
9 with minimization.

10 What do you believe my role is on the issue of
11 minimization? What deference, if any, am I to give what I know
12 to be the filings on minimization in this case?

13 MS. KUSHNER: Your Honor, I think there is a lot of
14 deference that the Court should give here.

15 So, again, in this context, once you find that any
16 FISA information was lawfully acquired, and then have to
17 consider whether it was also lawfully conducted, in considering
18 that, the question really is whether good faith efforts to
19 minimize were attended to, is that what the government did in
20 this case. And the mere fact that a significant amount of
21 discovery has been produced in this case, in no way goes to the
22 government's good faith effort to apply minimization standards
23 here.

24 As the Court is aware, there is wide latitude given to
25 the government in applying in good faith those minimization

NBF3GIRM

1 standards, including, for example, where, in this case, where
2 there's alleged clandestine activities and things, the
3 government cannot know necessarily off the bat whether some
4 language is code for something else or whether certain contacts
5 Girgis may have had is relevant.

6 So there is wide latitude given, especially in these
7 situations, where we're talking about for shorthand spying or
8 using someone as an agent of a foreign government, that the
9 government has to kind of take a fair and not overly narrow
10 approach in reviewing information. And so that may include --
11 that may mean not every wholly innocent conversation gets
12 minimized, but that's not the standard here, and that's not the
13 issue that the Court has to be deciding.

14 The Court simply has to look at whether a good faith
15 effort was made, and the Court can and should make that in an
16 ex parte proceeding here.

17 And I'll also add that our decision to turn over
18 discovery material has nothing to do with whether it was
19 minimized or whether it came from something that minimization
20 procedures would have even been applied to.

21 THE COURT: I'm not sure I understood your last
22 comment. Are you suggesting to me that you may have obtained
23 this material from sources other than the FISA warrants?

24 MS. KUSHNER: The discovery certainly includes
25 non-FISA derived information.

NBF3GIRM

1 THE COURT: Fair enough. And now you're leading into
2 the issue that your adversary raised. They've got so much
3 information that they are assuming it came from sources other
4 than FISA and the search warrant.

5 Are you prepared to comment on or to eschew the
6 involvement of Exec Order 12333 or other sources? I appreciate
7 that normally when discovery is produced, you don't say this
8 came from this, this came from this, although there are some
9 instances in which it's obvious that materials came from a
10 device order, because you see it is some coming from the
11 device.

12 The government in its opposition suggested that it was
13 unwilling to disclose every bit of investigative work it had
14 done in this case. But to the extent the work that it did
15 implicated the statutes or these provisions for which there
16 might be themselves a basis for suppression, will the
17 government acknowledge use of those particular avenues?

18 MS. KUSHNER: Your Honor, to date the government has
19 complied with its notice obligations, whether under FISA or
20 elsewhere. If there is any other obligation that the
21 government has that it has not done so to date or that it
22 learns about for some reason, then it would make additional --
23 it would give additional notice. But right now there is no
24 basis to believe the government hasn't complied with its notice
25 obligations. And if there is any investigative techniques --

NBF3GIRM

1 and I'm not aware there are, I'm not saying there are one way
2 or the other -- if there something that would have to be
3 brought to the Court's attention in a classified setting, the
4 government would do that.

5 But again, as far as FISA and general notice
6 provisions are concerned, the government has complied with its
7 obligations.

8 THE COURT: Let me probe a little bit more what your
9 adversary was saying, which is they don't want to be in the
10 situation where there is a suppression argument that they
11 failed to raise because they didn't know you used a particular
12 investigative technique in any case that would permit them to
13 make such an argument. And I appreciate that.

14 So I'd like you to focus on that, but I'd also like
15 you to focus on the fact that they themselves are using this
16 catchall provision "just in case." Right? Just in case
17 there's another basis for suppression that they don't want to
18 lose. They don't want to be in a situation where they've left
19 something on the table, and I appreciate that.

20 So how do you give them or me comfort that, to the
21 extent that some other investigative technique might implicate
22 a challenge, a suppression motion, was used, that they are
23 aware of it?

24 MS. KUSHNER: So, again, to date the government has
25 complied with its disclosure obligations, including providing

NBF3GIRM

1 any information that the defense would need to make a motion to
2 suppress. If there is some classified investigative technique
3 implicated in the government's case at all, then the government
4 believes that would be appropriately addressed in a Section 4
5 setting.

6 THE COURT: I figured I would hear that at some point
7 today and now I have, thank you. Should I be expecting at some
8 point a Section 4 application?

9 MS. KUSHNER: There is no schedule set, but, your
10 Honor, should the case proceed to a certain stage, then yes.

11 THE COURT: Okay. I appreciate the subtlety of that,
12 thank you.

13 Could you help me a little bit more with 3504. I
14 presume you're telling me that 3504 doesn't apply because it is
15 a general broader statute, and there are specific statutes of
16 which the defense is aware, and indeed, which they're invoking
17 in this case. Is there another reason why I should not be
18 focused on Section 3504?

19 MS. KUSHNER: No, your Honor. Again, 3504 is not the
20 governing notice provision with respect to FISA. The
21 government has given the notice pursuant to FISA and based
22 on -- there is no other basis for the government to provide
23 notice of anything under 3504.

24 THE COURT: I'll ask you the same questions I've asked
25 the defense. Have you seen a case in which a court, a federal

NBF3GIRM

1 court, has required disclosure even in order to aid it in
2 making a determination about the legality of the FISA
3 application or because of a different or related due process
4 concern?

5 MS. KUSHNER: I have not, your Honor.

6 THE COURT: I share Judge Rovner's concern in *Daoud*
7 that there's something unfortunate about not allowing the
8 defense the materials that it needs -- they don't even know
9 whether they have a *Franks* application to be made with respect
10 to the FISA warrants. And there is a degree, and it may be
11 enshrined by law and nothing you can do. But there is a degree
12 in which they're relying on me to vindicate their rights.

13 I am concerned, and I'm concerned given the arguments
14 that are being made, that there were errors or omissions to the
15 FISA court that may have yielded bases for surveillance,
16 searches whatever.

17 So, it may be that ultimately you are going to tell me
18 that's just the way the law is, but please understand my
19 frustration with that. So if there is something else you could
20 tell me, I would appreciate that.

21 MS. KUSHNER: Of course, your Honor. This FISA
22 setting is unusual to all of us in that there is strict
23 procedures for *ex parte* proceedings and not allowing the
24 adversary to see discovery, but for very important reasons, and
25 as is reflected in the case law and the legislative history of

NBF3GIRM

1 the statute, this was top of mind for Congress in deciding how
2 to balance national security concerns with an individual's
3 rights. So the ex parte procedures that FISA has laid out is
4 reflective of that balance.

5 And in this case, where the legality of any FISA
6 materials the government believes would be something that the
7 Court could readily determine on its face. That means that
8 FISA, the procedures that are afforded by FISA are working
9 appropriately.

10 If for some reason the Court believed, even though I'm
11 looking at all these materials I cannot determine the legality
12 of it, that is when an avenue would open to provide for an
13 adversarial proceeding. But that is not the world in which we
14 are living.

15 So I think in this case the Court is very well
16 situated to assure itself one way or the other whether there
17 was any material misstatement, and it would not require
18 defense's input in making that determination.

19 THE COURT: I want to agree with you and I want to
20 believe that I am capable of doing that. But something that
21 your adversary was raising a little bit earlier in the
22 discussion was that there is some significance to the quantum
23 of discovery produced, and I'm not sure I am going to be able
24 to articulate this properly but I am going to try and do this
25 nonetheless.

NBF3GIRM

1 I have the ability to look at a FISA warrant
2 application and to see what is contained in it. And there are
3 certain things that I imagine it would be easy for me to
4 determine, such as whether someone is a foreign agent or not a
5 foreign agent, or whether there are certain items that are tied
6 to someone who is either a foreign government or an agent of a
7 foreign government. So that I understand.

8 But what they are saying here is something different,
9 which is this isn't really -- the production of materials that
10 they have received is something I actually don't have. And to
11 the extent -- and I'm not asking for it, by the way. But to
12 the extent that the production of FISA discovery informs my
13 analysis of the minimization or something else, I just don't
14 have those materials. And so let me try that again with a
15 little more coherence.

16 I have a full drawer, almost a full drawer of
17 materials from you all that I have reviewed. And that can help
18 me understand whether there were, for example, and speaking
19 hypothetically, whether there were the appropriate
20 certifications. Whether there was an articulation of probable
21 cause. So that I get. I know that there are procedures for
22 minimization.

23 What your adversary is saying is that they will tell
24 you that the sheer amount of material they've received in
25 discovery suggests that the minimization procedures weren't

NBF3GIRM

1 working. That's not something I have, so how do I evaluate
2 their minimization arguments with the materials I do have and
3 not the materials that I don't have?

4 Do you understand what I've just asked?

5 MS. KUSHNER: You are saying you don't have access to
6 all the discovery materials that we've produced.

7 THE COURT: Exactly. What I'm saying is I don't know,
8 and maybe the answer is I need to speak to the government
9 pursuant to Section 2. What I am saying is there are things I
10 can do with the materials that I have been given. And I think
11 that I have the ability at least to determine whether I can or
12 cannot opine on the propriety of the certification. Whether I
13 can opine on the propriety of the probable cause.

14 On the issue of the minimization procedures, I'm
15 wondering if I have enough materials, because what I have would
16 be sort of the exhortatory or the directives to agents, do
17 this, don't do this.

18 But what they're saying to me is the sheer amount of
19 materials that they've received suggest that somewhere along
20 the line those directives weren't followed. That's what I'm
21 asking.

22 MS. KUSHNER: Sure, your Honor. And I do believe the
23 Court has everything it needs to determine whether the
24 government applied good faith, acted in good faith in applying
25 the minimization procedures. And I don't think that the volume

NBF3GIRM

1 of discovery, for a variety of reasons, has any relationship or
2 reflection on the propriety of the minimization standards
3 applied. So the fact that they have a lot of discovery has no
4 bearing on the good faith analysis here.

5 THE COURT: Are you also invoking *Leon* good faith on
6 any other aspect of the FISA applications? For example, it may
7 be that you are not going to articulate anything here for
8 various reasons, and it may be that you are not going to
9 respond until, for example, there is a challenge that goes
10 beyond we might benefit from seeing these materials to see if
11 there is a complaint to be made about the certification or the
12 probable cause procedures.

13 But I guess I am just asking, if they got to that
14 point and said, for example, probable cause wasn't adequately
15 articulated in the FISA materials. I suppose then they'd have
16 to see the FISA materials, so let me withdraw that whole line.

17 I was trying to figure out whether you were using *Leon*
18 for anything other than minimization. And I guess the answer
19 is you don't know until you know what their arguments are. It
20 could be the backstop for another suppression argument they're
21 making.

22 MS. KUSHNER: Of course, your Honor. At this time,
23 the good faith, the *Leon* good faith standard I am just talking
24 about in the minimization context.

25 THE COURT: Appreciate it. Thank you.

NBF3GIRM

1 The interesting thing about there being no cases doing
2 what the defense is asking me to do is that at some point there
3 will be a case where the facts and circumstances are such that
4 allowing the defense access to FISA materials is appropriate.
5 I know you said to me earlier that we haven't reached that yet.
6 But, from the defense's perspective, you have a challenge both
7 to the disclosure and the propriety of disclosures made to the
8 FISA court, but also to the integrity of the entire
9 investigative team. And I guess I'd like you to discuss with
10 me again, why, even with those challenges, they don't get
11 access to the FISA materials.

12 MS. KUSHNER: Your Honor, again, because we haven't
13 reached it, we're not even close to reaching that world. And I
14 can go into the *Franks* related issue in a Section 2 proceeding.
15 And with respect to any -- I think their primary concern about
16 the integrity of the case relates to McGonigal. To the extent
17 the government can disclose information about his role to the
18 defense, it has done so.

19 THE COURT: Can you tell me more than you've told
20 them?

21 MS. KUSHNER: Yes, your Honor.

22 THE COURT: Okay. I thought I understood, and perhaps
23 I didn't understand from the defense team that they might
24 accept a Section 2 -- I'm just saying what I remember from your
25 response is that there are discussions, but at a very generic

NBF3GIRM

1 level. He did this thing. He may have -- the word "approved"
2 is in there somewhere. The word "facilitated" is probably in
3 there somewhere.

4 But if I'm allowed to know exactly his involvement in
5 the FISA applications, then I suppose that I might feel more
6 comfortable in looking at that and seeing if there is
7 additional material. Though I said to the defense I wasn't
8 buying the argument that the disclosure raised more questions
9 than it answered, I do want to be sure I understand the
10 totality of his involvement, because he was in a pretty
11 significant position at the FBI when this was going on. So,
12 all right. I will leave open the possibility.

13 MS. KUSHNER: Just to be clear, your Honor, the
14 additional information has been disclosed to the Court, but
15 it's in the government's classified brief.

16 THE COURT: I understand. I'm not sure I was
17 satisfied with that. Let me say that. It doesn't mean I won't
18 be, but okay. Because I remember leaving that thinking there
19 might still be more. I will look at that and I will get back
20 to you as appropriate. Thank you.

21 Could you then please discuss the last argument that I
22 was addressing with the defense team which is this grooming
23 argument. And let me, before you do so, I want to make sure
24 that I understand it complete -- ah, here, too, I'm told that
25 they're willing to accept my in camera review.

NBF3GIRM

1 What can you tell us? What can you tell us? If there
2 were a concerted effort, would you disclose it?

3 MS. KUSHNER: A concerted effort by others to --

4 THE COURT: By Egyptian nationals to recruit Egyptian
5 expatriates for whatever, and basically turn them into
6 unwitting foreign agents.

7 MS. KUSHNER: Your Honor, the government has disclosed
8 all -- withdrawn.

9 The government has disclosed the relationship and the
10 efforts to task Girgis by these government officials. Whether
11 these or other intelligence officers ever tried to speak with
12 or recruit someone else ever is not discoverable or relevant in
13 this case, and would really I think, for lack of a better term,
14 I mean, I think it would get so far afield from what the issue
15 is here, and would be unmanageable. There is no way for the
16 government to determine ever what, if any, efforts were made by
17 other people to recruit others.

18 The case here is about whether Girgis himself knew
19 that he was working with and acting for a foreign agent,
20 including by cultivating and developing and carrying out tasks
21 for these nine Egyptian officials. And all of those efforts,
22 to the extent they're not classified, have been disclosed to
23 the defense. And the fact that I think they mentioned that
24 Flanagan made some suggestion that Girgis was an unwitting
25 source. Statements like that that pertain to Girgis, that has

NBF3GIRM

1 been disclosed to the defense. So if there was any sort of
2 *Brady* in that area or any arguments to be made that Girgis
3 himself was an unwitting source, that discovery has been
4 provided to the defense.

5 But whether someone ever tried to recruit somebody
6 else and that may or may not have been successful is not
7 relevant to whatever what happened here with respect to Girgis.

8 THE COURT: I'm agreeing with you in part to the
9 extent that in the course of -- that some representative of a
10 foreign country could try to recruit someone as an agent, and
11 succeed or fail, that that would not necessarily be
12 illuminative of the issue of whether Mr. Girgis was acting with
13 the appropriate intent. I get that.

14 I guess what I'm saying is if your investigation
15 disclosed -- and I'm kind of making this up for purposes of
16 this discussion -- but if your investigation disclosed that
17 there was in fact a handbook at the Egyptian consulate that
18 says we have a plan, we are going to go out there and find as
19 many expatriates as we can, and here's a way in which we can
20 reach out to them and see if ultimately they would be useful
21 for us and provide information for us.

22 If there was such a formal proceeding, would that not
23 be relevant?

24 MS. KUSHNER: Your Honor, it would not be relevant.
25 Again, the question here is whether Girgis himself was

NBF3GIRM

1 knowingly acting as an agent of a foreign government, and if
2 there was information that showed that he did not know, for
3 example, that someone he was working with was a member of the
4 government or that something he was doing was not for the
5 benefit of Egypt and was just out of the kindness of his heart
6 to organize some law enforcement trip, that kind of discovery
7 would -- that would be discoverable and that would be produced.
8 But, anything that is outside of that scope or general efforts
9 by Egyptian foreign officials to try to recruit others, that is
10 not relevant here.

11 What is relevant here is whether Girgis knew that he
12 was working for and at the direction of Egyptian officials.
13 And as we laid out in our brief, and obviously would prove if
14 and when there were a trial, is that there is overwhelming
15 evidence that he knew that the people he was working with were
16 officials for the Egyptian government, and in fact specifically
17 for an agency that is involved in the types of activities that
18 Girgis was helping them with.

19 THE COURT: Again, I appreciate the precision of your
20 answer. Thank you. Please give me a moment. Thank you.

21 Mr. Arthus, do you want to say anything in reply, sir?

22 MR. ARTHUS: I'll keep it brief.

23 THE COURT: You don't have to keep it brief. I'm not
24 sure I have questions, but I would appreciate your reactions to
25 what you've just heard.

NBF3GIRM

1 MR. ARTHUS: I'll start with the last point, which in
2 the Court's hypothetical of a handbook, that would be
3 incredibly relevant to the mens rea issue. If the issue was
4 whether or not Mr. Girgis knew that he was acting as a foreign
5 agent, the existence of a coordinated plan by Egyptians to
6 recruit people who would unknowingly act as their agents goes
7 directly to the mens rea. That would be critical information.

8 THE COURT: Only if the handbook said let's recruit
9 them and let's make sure they don't know. If the handbook says
10 let's recruit them and make sure they know --

11 MR. ARTHUS: A scheme to recruit unwitting agents,
12 that would be incredibly relevant and material to a defense.

13 There was one thing I neglected to mention earlier but
14 I wanted to raise about the other surveillance potential
15 methods and the relevance to the case. It also is relevant to
16 the FISA litigation itself. Because to the extent anything was
17 captured by those other surveillance methods and then cited in
18 the FISA warrant materials, that would give rise to a fruit of
19 the poisonous tree argument. So it is relevant in that context
20 as well.

21 THE COURT: Can I ask you to pause for a moment so I
22 can write that down. Thank you.

23 MR. ARTHUS: Sure.

24 As a final point of the minimization issue. I think
25 the Court hit the nail on the head with the question about the

NBF3GIRM

1 discovery and scope of it and the amount. That's precisely why
2 adversarial litigation is needed in this kind of circumstance.
3 We've been reviewing this voluminous discovery for months and
4 months and months now, and the Court's seen on the docket the
5 adjournments that have been taken while we've been reviewing
6 this discovery. This is precisely the kind of situation where
7 the Court would benefit from our consideration in order to make
8 the determination on minimization. FISA doesn't -- it doesn't
9 mandate, and the Court's aware of this, but it doesn't mandate
10 cutting us out of the process.

11 THE COURT: It doesn't what?

12 MR. ARTHUS: It doesn't mandate cutting us out of the
13 process. If our input is valuable to the Court in making an
14 accurate determination of the legality, if it is necessary for
15 due process, then we are entitled to be included. And that's
16 the Court's determination to make. But our position is that
17 both of those prongs are met, so we should get access to the
18 FISA materials on that basis.

19 THE COURT: Anything else, sir?

20 MR. ARTHUS: No, thank you.

21 THE COURT: If you both all just give me a moment, I
22 want to make sure there isn't an unanswered question for me.

23 Mr. Wirshba, something else to add?

24 MR. WIRSHBA: Sure, your Honor. Your Honor, with
25 respect to your specific example of the handbook, I will say

NBF3GIRM

1 that --

2 THE COURT: Which, by the way, I'm making up, to be
3 clear.

4 MR. WIRSHBA: Right. And to be clear, the government
5 is not aware of such a handbook as I sit here today. The
6 people at this table are not aware of such a handbook, and that
7 was obviously a hypothetical that your Honor came up with.

8 Of course if there were such a handbook that the
9 government was aware of within the prosecution team's
10 possession, the government would undertake an individualized
11 examination of whatever document or item it is to determine
12 whether or not there is a discovery obligation with respect to
13 that item, and either disclose it or bring it to the Court's
14 attention in a Section 4 proceeding.

15 What I will say, and I think is the focus of the
16 defense arguments, is that with respect to efforts by
17 intelligence agents of Egypt to recruit other people, that
18 discovery of those materials is too far afield, and I think
19 that that is really the focus of what the defense has raised
20 with the Court, and that is the focus of what the government is
21 saying is just absolutely not discoverable here. So we --

22 THE COURT: Why?

23 MR. WIRSHBA: Because while the handbook is a very
24 specific example that might actually implicate Pierre Grgis,
25 the fact that they are attempting to recruit another person --

NBF3GIRM

1 not saying whether that actually happened or not -- but the
2 fact that they are attempting to recruit another person would
3 not have any bearing on Mr. Gergis's mens rea in this case,
4 which is the issue that will be relevant at trial.

5 And to require the government, even in an in camera
6 setting, to bring forth all the materials that might reflect
7 whether or not these intelligence officials were recruiting
8 others would be tremendously burdensome and outside of the
9 requirements of any disclosure obligation that the government
10 has.

11 THE COURT: Thank you.

12 Mr. Arthus, you get the last word here.

13 MR. ARTHUS: No response is needed. Thanks.

14 THE COURT: Thank you. I don't think at the moment it
15 would be useful for me to now break out and have the classified
16 proceeding. I think the better thing is for me to rereview
17 certain materials in light of what has been said today, and
18 I'll ask the government to please obtain a transcript of this
19 proceeding so that I can have that with me as I'm doing it.
20 And then I will get back to the government as appropriate if I
21 need to have anything shown to me or discussed with me in a
22 classified setting. And otherwise I'll get back to you as soon
23 as I can. All right.

24 Anything else to address today?

25 MS. KUSHNER: Not from the government, your Honor.

NBF3GIRM

1 MR. ARTHUS: No, thank you.

2 THE COURT: I thank you all very much. Much
3 appreciated for the argument. We are adjourned.

4 (Adjourned)

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